for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

Volume 2, Issue 1 -- January 1992

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Maricopa County Public Defender

Contents:

POST-TRIAL "TAINT" OF JURORS: Unprofessional Conduct by Prosecutors

We have all had it happen, win or lose, after a jury trial. Following the verdict the judge allows the attorneys to talk with the jury. The purpose is for self-education. Unfortunately, however (especially if there is an acquittal), once you are in the jury room some prosecutors proceed to tell the jury that there was other incriminating evidence that the judge did not allow to be presented at trial, that the defendant had a prior conviction, or that the defendant has other outstanding criminal charges. The prosecutor often adds that the reason the defendant did not testify was because of a prior felony conviction or other pending charges! Is any of the above conduct unprofessional? The answer is yes!

Arizona State Bar Ethics Opinions

The Arizona State Bar has opined that it is unprofessional to taint jurors. Prior to 1968, the Arizona State Bar, following the lead of the American Bar Association, took a restrictive view of post-verdict jurors' interviews. ABA Opinion 109 and Arizona State Bar Opinion 200 both reasoned that it was ethically improper to interview jurors post-trial as to how they arrived at a verdict "except in the event of fraud, or a situation where there [had] been a mistake in announcing or recording of a verdict". When the ABA took a more liberal approach in the late 1960's, Arizona also quickly adopted the same position.

That position is fairly summarized by saying that courts began to recognize that irregularities affecting verdicts need to be supported with documentation. Slowly, post-trial interviews came to be accepted for that purpose. Simultaneously, and as importantly, the ABA emphasized the educational aspects of post-verdict juror discussions. The ABA wrote ". . . it is not unethical, in states where it is not illegal, for the purpose of self-education, to communicate in an informal manner with jurors who are willing to talk."

The last pronouncement by the Arizona State Bar Ethics Committee on post-trial jurors' interviews was in 1978 (Opinion No. 78-42 [available upon request from Training]). That opinion, requested by our office, specifically asked the Committee to determine whether it was unprofessional conduct for a prosecutor to approach members of a post-trial jury and tell them: 1) the defendant had a prior conviction; 2) the reason the defendant did not testify was because of a prior conviction; 3) the defendant had other outstanding criminal charges; and/or 4) there was other incriminating evidence that the prosecution was not allowed to present at trial. *The Committee found that each action by the prosecutor was unprofessional conduct under the Code of Professional Responsibility.*

The opinion noted that although the historical trend was toward allowing juror interviews, there was no educational purpose achieved by allowing prosecutors to make statements "presented in such a way which might lead jurors in the future to conclude that defendants have a poor character or a criminal record . . . ."

The 1978 Ethics Opinion relied heavily upon Disciplinary Rule (DR) 7-108(D) as well as Ethical Considerations (EC) 7-10, 7-29 and 7-33 that were part of the Arizona Code of Professional Responsibility. Those rules were replaced in 1985 by the Arizona Rules of Professional Conduct which are based upon the ABA Model Rules of Professional Conduct.

Former DR 7-108 has been replaced by ER 3.5 which has less specific language and arguably now permits any contact as long as it is not prohibited by law. However, additional authority supports the proposition that the conduct described above is unprofessional.

(cont. on pg. 2)

ABA Standards for Criminal Justice, The Prosecution Function

The Standards for Criminal Justice were developed by the ABA between the adoption of the Code of Professional Responsibility and the Model Rules. Unfortunately, for whatever reason, they were not included in the Model Rules. The failure to integrate the Model Rules with the ABA Standards is interesting because since their promulgation, the Standards on the Prosecution Function have been cited by literally hundreds of courts.

Nevertheless, the ABA Criminal Justice Standards remain an important authority to provide guidance to lawyers, the courts and state bars. Standard 5.4(c) of the Prosecutorial Function addressing relations with jurors provides that:

"After verdict, the prosecutor should not make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which would tend to influence judgment in future jury service."

Additionally, Standard 5.10 provides:

"The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury."

Taken together, along with the prosecutorial duty prohibiting arguing information not in evidence, it is clear that prosecutors who tell jurors about inadmissible evidence are engaging in suspect, if not unprofessional or unethical conduct that should not be tolerated by the defense bar, "professional" prosecutors or judges.

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Respect for the jury's verdict is also emphasized by the National District Attorneys Association Standards. Although the standards do not denote what is unethical or unprofessional conduct, they provide guidelines that prosecutors should implement in their offices. Significantly, the NDAA Standards were designed for prosecutors by prosecutors. Standard 27.2(E), that mirrors the former Code of Professional Responsibility, provides that "[t]he prosecutor should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which would tend to influence or prejudice judgment in future jury service."

The commentary provided by the NDAA also makes it clear that public comments should not be made that harass or embarrass the jury. "Any comments which tend to influence or prejudice a juror's judgment in any future jury service are improper."

The Courts

As previously discussed, it is generally not unethical (in states where it is not illegal) to communicate in an informal manner with willing jurors for the purpose of self-education.

Federal courts, however, have taken a different view. Federal district courts have a prohibition against post-verdict interviews of jurors unless they are under the supervision of the court. United States v. Kepreos, 759 F.2d 961 (1985). The federal view is that permitting unbridled interviews of jurors diminishes confidence in jury verdicts and leads to unbalanced trial results depending upon the relative resources of the parties. Id. The latter concern is of particular importance for mistrials.

Unlike our state courts, the federal system is concerned about prosecution attempts to interview jurors in an effort to improve their presentation for retrial. As one court put it, "such conduct represents a serious breach of ethics on the part of the Assistant United States Attorney." United States v. Puleo, 817 F.2d 702 (11th Cir. 1987). The government, with its unlimited resources, should not be given the advantage of honing its prosecution of the defendant.

What's the Issue

The jury is a cornerstone of our nation's judicial system. Attorneys that routinely taint jurors by browbeating them or telling them about inadmissible evidence do a disservice to jurors and to the jury system. Jurors should not be made to feel bad about trying to do the best job they could; and it seems not only discourteous, but unprofessional and unethical for attorneys (particularly prosecutors), to try to prejudice a juror's future service.

(cont. on pg. 3)

What's the Remedy

In a typical situation, there is no remedy that can be granted by the court that will assist our clients. The issue for defense attorneys is insuring that future jurors are not tainted for jury service. Truly unprofessional conduct should be handled like any other matter that appears to be a violation of the Rules of Professional Conduct. Although the issue of using post-verdict jurors' interviews to assist in re-trying defendants has not been litigated, issues of fairness and jeopardy may arise as they have in some federal cases. Defense counsel should be alert to this issue as well.

One way to prevent the conduct is to file a motion in limine requesting that the conduct be prohibited. This insures that jurors will not be embarrassed or that their future jury conduct will not be prejudiced. The motion need not be complex and can be supported by Opinion No. 78-42. This will insure that the jury pool is free from taint as much as possible.

Endnotes:

1. In one instance following a mistrial for sexual assault, a prosecutor went so far as to tell the jury that the defendant has AIDS even though it had been ruled inadmissible for the trial. The most frequent occurrence is telling jurors that our clients have prior felony convictions.

2. See Opinion No. 250.

3. DR 7-108(D) provides that "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

4. The ABA Model Rules were approved by the House of Delegates in 1983. The Model Rules now provide the black letter law on professional conduct and approximately half of the states have adopted them. **CJ ^**

SIDE BAR: Why do prosecutors get to be closer to jurors during the trial than defense lawyers? Is it because they have the burden of proof or that the government's presentation should be more closely observed? Some jurisdictions set up counsel tables side-by-side, facing the jury, giving neither side any advantage of proximity. Gerry Spence advocates that the defendant should be seated closer to the jury because he or she has the most at stake to lose. Spence has tried on several occasions to claim the closest table by seating himself there. If anyone knows of any rule or legal basis making the table closest to the jury the exclusive province of the government, please forward that information to the editor.

DURANGO SKILLS TRAINING PROGRAM

By Gary Kula

Everybody has heard about it but no one seems to know exactly what it is. The name, Durango Skills Training Program, known as DSTP, evokes images of inmates standing around in a classroom at the Durango Jail learning the difference between a hammer and a mallet. In actuality, the program offered through DSTP is rigorous, comprehensive and very technical. The select inmates who are chosen to participate are given a rare opportunity, without cost, to select a trade, learn that trade, earn a skill certificate and be placed in a job within the community.

Maricopa Skills Center

DSTP is only a small component of the program offered through the Maricopa Skills Center, a division of Gateway Community College. The center, which is located at 1245 East Buckeye Road in Phoenix is a new facility with over 400 full-time students in attendance on any given day. Inmate participants make up only 5% of the student population. Throughout the course of the year, about 110 inmates are allowed to participate. DSTP itself is funded solely by employment and training federal grants through the Job Training Partnership Act (JTPA) (Public Law 97-300) from the Department of Labor. The funds are administered through state, county and city of Phoenix JTPA administrators and staff, and are governed through local private industry councils.

Eligibility Criteria and Selection Procedure

The application processn begins with a tank order from an inmate requesting an application, a referral from a probation officer or a recommendation by the sentencing judge. A minimum sentence of four months jail is required, since the application process takes approximately 30 days and the programs themselves range in length from 16 to 20 weeks. The general criteria for the program are:

*18 years of age.
*A minimum or medium security jail classification.
*No holds, detainers or outstanding warrants.
*In disciplinary good standing with the detention staff.
*Not an escape risk.
*Lacking in an employment skill.
*Economically disadvantaged
*A willingness to accept jail employment (trustee).
*Sentencing completed on all charges with placement on probation.
*Within six months of release date unless work furlough eligible upon completion of program.
*A willingness to accept and remain at training-related work for at least six months following completion of the program.

(cont. on pg. 4)

For clients who meet the basic eligibility criteria, the most significant hurdle is the approval of the application by the MCSO selection committee which is comprised of representatives of the jail classification staff, the inmate services administration and the DSTP staff. The selection committee considers the applicant's arrest history, underlying offense, violence potential, presentence report and the probation officer's recommendations. An application is rejected if any member of the selection committee feels the applicant is inappropriate. The stringent screening process is justified by concerns that the entire program may be jeopardized by the criminal acts of one participant while on release to participate in the program. As the Maricopa Skills Center is an open campus and is not a secure facility, concern for the safety of other students and those in the nearby neighborhoods and schools is paramount to the selection committee.

Areas of Study

A participant in DSTP may select from eleven skill areas. These areas are: auto body, facilities maintenance, food preparations, health occupations, hotel operations, machine trades, meat cutting, office and computer occupations, printing trades, retail/banking and welding trades. Each of these areas is broken down into specialized skill areas so that students can decide how far they wish to proceed in the development of their skills. A participant studying machine trades, for example, can earn progressive certificates ranging from Saw Operator (80 clock hours) all the way to Computer Controlled Machine Operation (880 clock hours).

All of the machinery and equipment within the facility is technologically current. Those studying computers have access to dozens of terminals. Those studying meat cutting actually operate a small store within the facility. The lunch room is run solely by students who are responsible for planning, cooking and servicing all meals. In the auto body shop, students repair, refinish and paint damaged cars that are brought in.

The curriculum is set up so that a student can begin any program on any Monday and proceed at his or her own pace. The instructors are recruited from industry and are instrumental in the placement of students within the community.

For students who have not completed high school, two hours of each school day is set aside for GED classes at the Learning Center located at the center. Students are individually tested and assisted, if necessary, to make sure that their reading and math abilities are at the level needed for their skill area.

A Day in the Life

Participants are picked up at the jail every morning by a Maricopa Skills Center bus. Once they are picked up, inmates, who are allowed to wear civilian clothes, are mixed in with the general student population. Unlike the general student population, however, inmate participants must remain on the Maricopa Skills Center grounds at all times. Classes begin at 8:00 a.m. and the last class ends at 4:00 p.m. DSTP conducts six head counts daily to insure attendance and security. A participant who misses a head count is expelled from the program. If someone is more than 30 minutes late for a head count, he or she is considered an escapee. Random intoxilyzer tests and urine samples are required. Participants must also consent to being subjected to search at any time. These rules are strictly enforced and any disciplinary incidents are not tolerated as the program administrators know that there are dozens, if not hundreds, of inmates who would be willing to follow the strict rules of the program if given a chance to participate.

Participants in the program are paid $6 a day. About one-third of their weekly earnings is used to pay for program related expenses such as commissary items and laundry. Any expenses which are necessary for participation in the training program are paid by DSTP (a division of the JTPA Social Services Department). Protective glasses, steel-toed shoes and welding helmets are expensive examples of the items given to participants without charge. They are allowed to keep these items so that they not only have the equipment necessary to learn their trade, but also are ready to enter the work place with the equipment they need to perform their job. Support services such as counseling, transportation expenses and any necessary referrals are provided as needed. Follow-up investigations are routinely performed to monitor an individual's continued progress.

Placement

As participants near the completion of their skills training, they are required to attend a job search class. In this class they learn about resume and application preparation, and are trained in interview skills through mock job interviews and video demonstrations. Potential employers are contacted by Ed Gatlin of DSTP, who networks in the community to find suitable employment for the participants. Currently, over 1,200 employers in the Phoenix area have either hired graduates of the Maricopa Skills Center or have expressed a willingness to do so. Qualified employers who require additional training of the DSTP participant are reimbursed up to 50% of the salary they pay to a new hire during the training period. Research indicates that six months following placement, the vast majority of the participants are working in either the job they were originally placed in or a similar job within the same industry.

Conclusion

For the client who can meet the eligibility criteria and get past the selection committee, DSTP is a great opportunity. Your client, who has been sentenced to jail as a term of probation, has probably never heard of the program. As a defense attorney you should take an active role in discussing this program with the probation officer and the sentencing judge. The DSTP program, which would ordinarily cost your client around $4,000, should be actively pursued. The Director of DSTP, Olga Silva, is willing to answer any questions you may have. You can reach her at 256-1924 or 238-4343 (Maricopa Skills Center). Interested clients should contact her through you, with a tank order or through their probation officer. DSTP is a worthwhile program. ^

CONTEMPORANEOUSLY PUTTING BENCH CONFERENCES ON THE RECORD:
Speak Now or Forever Hold Your Peace!

Two issues invariably come up when dealing with bench conferences. Many trial lawyers simply opt not to make them "on the record" (apparently because they think the issue being discussed is inconsequential) and therefore leave the record bare if they fail to win the trial. The other circumstance is when the trial judge announces that he or she will not allow you to make a contemporaneous record. Both do a disservice to our clients.

There are few things said by you, the judge or the prosecutor during the trial that should not be part of the record. Put another way, if it is worth approaching the bench (because someone thought it was important), it is probably worth putting on the record. How about this: Why would you not want to put whatever is being discussed on the record for your client in the event an appeal needs to be taken? The bottom line is that it is good practice to put as much as you can on the record and most attorneys know that.

The more difficult an issue is, the more likely the trial judge will not let you do a contemporaneous record. Those judges usually announce before trial that they will reconstruct bench conferences at recesses. This preference or order is usually based upon the belief that sidebar conferences on the record are awkward and impractical. Is there anything you can do? Yes! Make a motion and incorporate the following discussion.

Court of Appeals Decisions Condemning Failure of Trial Court to Allow Contemporaneous Record of the Sidebar

The practice of reconstructing bench conferences during recesses after disallowing a contemporaneous record at the time of an objection has been condemned in State v. Babineaux, 22 Ariz. App. 322, 526 P.2d 1277 (1974). In Babineaux, the trial court preferred that defense counsel make a record at an "opportune moment when the trial would not necessarily be delayed for any other reason and the court reporter was present. Of course, counsel for the defendant had to either note the motion and its surrounding circumstances or rely on spontaneous recall to assure a correct record of his motions or objections". The Court of Appeals opined that:

"We strongly disapprove of the described practice. While at times it may be expedient and avoid some delay, it more often leads to confusion and inefficiency, frequently defeating the goal of preserving for appellate review an accurate record of what actually transpired in the trial proceedings."

Id. at P.2d 1279.

Division II of the Court of Appeals has also condemned this same practice in State v. Sanchez, 130 Ariz. 295, 635 P.2d 1217 (1981). In Sanchez, defense counsel moved that all bench conferences be reported. The trial court indicated that the procedure was cumbersome, conferences would be off-the-record and a record could be made at the next court recess. The Sanchez court noted that the practice is disapproved (in this case, however, the defendant had not shown any prejudice to warrant reversible error).

Supreme Court Cases Disapproving of Off-the-Record Discussions

The Arizona Supreme Court has also condemned the practice in the related contexts of discussing jury notes (State v. Fletcher, 149 Ariz. 187 (1986)); arguing motions in limine (State v. Bay, 150 Ariz. 112, 722 P.2d 280 (1986)); and settling jury instructions (Gosewisch v. American Honda Motor Co., 153 Ariz. 400, 737 P.2d 376 (1987)).

The harm is, of course, that the off-the-record discussions can later be disputed. The judge, prosecutor and defense counsel may disagree on what was said. Just as likely, in the heat of battle and with the large number of issues being dealt with by defense counsel, even remembering to make a later record can be difficult.

Failure to make the record of issues that may provide the basis for an appeal is an unfair trial. Article 2, Section 24 of the Arizona constitution guarantees the right to appeal. Moreover, denial by the trial court of contemporaneous recorded bench conferences or sidebars also violates the state and federal due process guarantees. Additionally, it may also deny our clients equal protection under the state and federal constitutions. The basis for the equal protection violation is that in trial courts where a contemporaneous record is made defendants are able to fully exercise their right to appeal as opposed to courts that refuse to allow to the better practice.

Conclusion

If the trial court denies defense counsel the opportunity to make contemporaneous conferences on the record, a record should be made at the earliest opportunity objecting to the practice. Babineaux, Sanchez, and the Arizona Supreme Court cases listed above should be cited, as well as the Arizona Constitutional right to appeal, due process and equal protection clauses. Federal constitutional grounds should also be cited. (See page 6 for a sample motion.)

Endnote:

1. The legal research in this article is based upon a brief written by Appellate Attorney Edward McGee in State v. Drew. **CJ^**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,	)	
	)	No. CR-*
Plaintiff,	)	
	)	**MOTION FOR CONTEMPORANEOUS RECORD OF**
v.	)	**MOTIONS & OBJECTIONS TO PRESERVE**
	)	**DEFENDANT'S APPEAL RIGHTS**
*,	)	
	)	(Assigned to the Honorable
Defendant.	)	*)
	)	(Oral Argument Requested)

This court has announced that it prefers that bench conferences on the record not be conducted during trial. The court's preference is for reconstructing conferences on the record at recesses. This practice is unfair, effectively denies defendant the right to appeal and has been disapproved by both divisions of the Arizona Court of Appeals, as well as by our Supreme Court on related issues. The court should grant defense counsel's motion to allow contemporaneous bench conferences and motions so that appellate review will not be defeated and so that there will be an accurate record of what actually transpired during the trial. This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The practice of holding conferences off-the-record and making a record at a later recess has been strongly disapproved by our appellate courts. In State v. Babineaux, 22 Ariz. App. 322, 526 P.2d 1277 (1974), the trial court preferred to make a record not at the time of the objection or motion, but at an "opportune moment when the trial would not necessarily be delayed for any other reason and the court reporter [was] present". Presiding Judge Haire opined that "[w]e strongly disapprove of the described practice. While at times it may be expedient and avoid some delay, it more often leads to confusion and inefficiency, frequently defeating the goal of preserving for appellate review an accurate record of what actually transpired in the trial proceedings." Id. at P.2d 1279 (a copy of Babineaux is attached to this motion for the court's convenience).

Division II of our Court of Appeals citing Babineaux with approval echoed its disapproval of the practice in State v. Sanchez, 130 Ariz. 295, 636 P.2d 1217 (1981) (noting, however, that in this particular case the defendant had failed to show prejudice and hence it was not reversible error).

The Arizona Supreme Court has also condemned the practice in the related contexts of discussing jury notes (State v. Fletcher, 149 Ariz. 187 (1986)); arguing motions in limine (State v. Bay, 150 Ariz. 112, 722 P.2d 280 (1986)); and settling jury instructions (Gosewisch v. American Honda Motor Co., 153 Ariz. 400, 737 P.2d 376 (1987)).

In this case if counsel is denied the opportunity to contemporaneously make a record involving objections or motions his client will be denied the right to appeal. The potential for disagreements over what was said earlier or to inaccurately reconstruct an objection is great. Once a train of thought is interrupted, with the large number of issues confronted trial lawyers, it is often impossible to reconstruct issues and legal arguments.

In a series of cases beginning with Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 101 L.Ed. 891 (1956), the United States Supreme Court has held that states cannot, consistent with equal protection principles, on one hand create a right to appeal, and on the other hand, simultaneously create artificial barriers to the exercise of that right. See also, Eskridge v. Washington, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958) (appeal conditioned on approval of trial judge); Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (appeal conditioned on payment of filing fee); and Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963) (appeal conditioned on request of public defender).

Similarly, there can be no equal justice where the kind of appeal a defendant receives depends on whether the trial judge allows counsel to contemporaneously have the court reporter record bench conferences. Denial of a trial that can be appealed violates Art. 2, §24 of the Arizona Constitution. It also violates state and

federal due process guarantees, as well as the equal protection clause (since defendants before judges that allow contemporaneous records can fully exercise their right to appeal and those before judges that do not are effectively denied the right to appeal) because of an incomplete record.

The court should grant defendant's motion in order to insure a complete and accurate record protecting his right to appeal in the event the jury fails to find him not guilty.

RESPECTFULLY SUBMITTED this _____ day of *, 1992.

DEAN TREBESCH
Maricopa County Public Defender

By_____
Deputy Public Defender

Copy of the foregoing motion
mailed/delivered this _____
day of *, 1992 to:

HON. *
Judge of the Superior Court

*
Deputy County Attorney

By_____
CHRISTOPHER JOHNS
Deputy Public Defender^

FYI

A.R.S. Section 13-4051 is a little-known statute that will be useful if your client has been wrongly arrested or charged (e.g., if his brother used his name in earlier police contact).

The statute reads, "Any person who is wrongfully arrested, indicted or otherwise charged for any crime may petition the superior court for entry upon all court records, police records and any other records of any other agency relating to such arrest or indictment a notation that the person has been cleared."

If the court issues the order requiring the entry on the records that the person has been cleared, "[t]he order shall further require that all law enforcement agencies and courts shall not release copies of such records to any person except upon order of the court."

ARIZONA ADVANCED REPORTS

Volume 101

State v. Anderson
101 Ariz. Adv. Rep. 85, November 27, 1991 (Div. 2)

Defendant was charged with three counts of sexual assault. At trial, the defense introduced evidence of the defendant's good character. The state moved to introduce evidence about the details related to another prosecution against the defendant which resulted in his acquittal. Defendant had apparently admitted to possessing a drug but had denied stealing it from his employer. The character witnesses were asked if they knew that the defendant admitted to stealing a drug from the hospital. Defense counsel did not object. However, it was fundamental error for the prosecutor to falsely state that defendant had admitted to stealing drugs. Asking a question which implies the existence of facts which the examiner cannot support by evidence is unprofessional conduct. The practice of seeking to obtain an advantage in a trial by injecting unfair insinuations should have the severest condemnation and suffer the most disastrous result permissible under law. The conviction is reversed. [See also dissent.]

State v. Barnet
101 Ariz. Adv. Rep. 100, November 29, 1991 (Div. 2)

Defendant was tried and convicted of aggravated assault. He argues that the trial court should have instructed the jury on attempted aggravated assault as a less-included offense. Defendant neither requested such an instruction nor objected when one was not given. No fundamental error occurred. Defendant did not deny causing physical injury to the victim. He claimed self-defense. The jury was adequately instructed on simple and aggravated assault.

Defendant was charged with aggravated assault under A.R.S. Section 13-1204(A)(8), committed while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired. Defendant claims that the court should have granted his motion for a directed verdict where there was insufficient evidence that the victim was restrained or impaired. Restraint has been defined as "confinement, limitation or prohibition of action". The victim testified that one of his assailants was on top of him while he was being assaulted. This testimony was sufficient to show physical restraint. [See also dissent.]

Defendant claims that the state presented a different theory at trial than was presented to the grand jury. The grand jury heard evidence that the victim was restrained by a stun gun. The evidence at trial was that the victim was restrained by someone on top of him. Defendant claims that he had no notice that the state would change its theory, similar to State v. Martin, 139 Ariz. 466 (1984). No error occurred. The grand jury heard evidence of two individuals assaulting the victim, one of whom used a stun gun. The trial jury heard similar evidence with the exception that the stun gun was apparently not as disabling as first believed. The state's proof at trial was not of uncharged and unanticipated conduct.

State v. Benson
101 Ariz. Adv. Rep. 74, December 12, 1991 (Div. 1)

The state moved to forfeit a car and cash seized during a drug arrest. The defendant's motion to dismiss the proceedings was granted and the state filed an appeal. The property was released to the defendant. Defendant claims that the release of the property divests the court of jurisdiction. Release of the property in an in rem forfeiture generally ends the court's jurisdiction. However, a court does not lose jurisdiction if the release of the property is obtained accidentally, fraudulently or improperly. The release of this property was improper because it violated a stay order entered by the trial court. Jurisdiction remains.

During the proceedings, the trial court struck defendant's claim for failure to comply with statutory requirements. The state argues that striking the claim deprives defendant of standing to contest the forfeiture. The defendant's claim failed to conform to A.R.S. Section 13-4311(e). Once the court struck the claim, the defendant no longer had standing to litigate issues of the forfeiture action.

Defendant claims that the trial judge abused his discretion by refusing to allow him to amend his claim. Defendant claims that his claim satisfied all basic substantive requirements and his failure to supply all the information required by A.R.S. Section 13-4311(e) should be excused. When a claimant files a claim that substantially complies with the statute and satisfies basic substantive concerns, the trial court should permit him to amend his claim to correct technical inadequacies. The trial court abused its discretion in refusing to grant defendant an extension of time to amend his claim.

(cont. on pg. 9)

State v. O'Neil
101 Ariz. Adv. Rep. 104, December 10, 1991 (Div. 2)

Defendant was charged with aggravated assault and criminal damage. Defendant requested interviews with the victims. The victims advised the prosecutor that they would refuse. Defendant filed a motion that his counsel be present during any prosecution interviews of the victims. The court ordered the state to record all statements of the victims to the prosecutor and to provide defense counsel with transcripts. The state sought special action relief under the Victims' Bill of Rights. The trial judge abused his discretion. First, nothing in the criminal discovery rules authorizes the trial judge to require the state to create or produce evidence, specifically statements, which it must then disclose. Rule 15 does not require the state to make a recording any time its representatives speak with a witness. Second, the court's interpretation of Rule 15.1(e) results in an impermissible conflict with the Victims' Bill of Rights. To apply Rule 15.1(e) as the trial court has done enables the defendant to make an end run around the constitutional right conferred upon victims to refuse any discovery requests. The Victims' Bill of Rights abrogates a defendant's right under Rule 15 to interview or otherwise seek discovery from an unwilling victim.

State v. Rodriguez
101 Ariz. Adv. Rep. 78, December 12, 1991 (Div. 1)

Defendant entered an Alford plea to conspiracy to manufacture a dangerous drug. Defendant claims that there was an insufficient factual basis because no conspiracy was established. The only evidence of a conspiracy was that three other people were in the lab at the same time defendant was arrested. While circumstantial evidence can be sufficient to provide a factual basis for a conspiracy plea, it cannot be inferred from the mere presence of other persons that a conspiracy existed. The mere presence of a person at the scene of a crime, even where the person knows that a crime is taking place, will not support a conspiracy conviction. The conviction is reversed. [Appeal presented by James R. Rummage, MCPD.]

State v. Cook, 101 Ariz. Adv. Rep. 20 and State v. Greenway, 101 Ariz. Adv. Rep. 7 will be reviewed in the next newsletter.

DECEMBER JURY TRIALS

November 18

Eric G. Crocker: Client charged with conspiracy to possess/purchase marijuana and conducting an illegal enterprise. Trial before Judge Seidel ended in a mistrial December 16 (because defense counsel was in an automobile accident.). Prosecutor Rosen.

November 25

Priscilla E. Forsyth (Advisory Counsel): Client charged with fraudulent schemes (5 counts). Trial before Judge Hendrix ended December 10. Defendant found guilty on all five counts with two priors. Prosecutor J. Martinez.

Leonard T. Whitfield: Client charged with theft and possession of stolen property. Trial before Judge Katz ended with a hung jury on December 03. Prosecutor B. Christensen.

November 27

Curtis Beckman: Client charged with attempted murder. Trial before Judge Schneider ended December 06. Defendant found not guilty. Prosecutor G. Guerin.

December 02

Roland J. Steinle: Client charged with kidnapping and attempted sexual assault. Trial before Judge Portley ended December 10. Defendant found not guilty of kidnapping; hung jury on attempted sexual assault charge. Prosecutor N. Miller.

December 03

Cecil P. Ash: Client charged with aggravated assault (2 counts). Trial before Judge Sheldon ended December 06. Defendant found not guilty. Prosecutor J. Beatty.

Thomas J. Phalen: Client charged with child abuse (2 counts) and assault (2 counts). Trial before Judge Martin ended December 18. Defendant found not guilty on all counts. Prosecutor D. Greer.

Valarie P. Shears: Client charged with forgery. Trial before Judge Pro Tempore Rea ended December 06. Defendant found not guilty. Prosecutor T. Doran.

Jeffrey L. Victor: Client charged with aggravated assault (dangerous). Trial before Judge Hotham ended with a hung jury (7-1 not guilty) December 08. Prosecutor H. Williams.

December 04

Robert F. Ellig: Client charged with aggravated assault (dangerous). Trial before Judge Hertzberg ended December 13. Defendant found guilty. Prosecutor D. Rodriguez.

William A. Peterson: Client charged with possession of dangerous drugs. Trial before Judge Galati ended December 05. Defendant found not guilty. Prosecutor R. Knapp.

Kevin M. VanNorman: Client charged with burglary. Trial before Judge Grounds ended December 12. Defendant found guilty. Prosecutor T. Glow.

Gerald A. Williams: Client charged with DUI. Trial before Judge Dougherty ended with a hung jury December 05. Prosecutor R. Nothwehr. (cont. on pg. 10)

James A. Wilson: Client charged with aggravated DUI and driving with a suspended license. Trial before Judge Gottsfield ended December 09. Defendant found not guilty of aggravated DUI and guilty of driving with a suspended license. Prosecutor M. Spizzirri.

December 09

William A. Peterson: Client charged with child molestation. Trial before Judge Hall ended December 11. Defendant found not guilty. Prosecutor L. Reckart.

Philip S. Vavalides: Client charged with armed robbery (4 counts). Trial before Judge Dougherty ended December 18. Defendant found guilty. Prosecutor P. Hern.

December 11

Jeffrey L. Victor: Client charged with child molestation (6 counts). Trial before Judge Ryan. Defendant found guilty (5 counts). Prosecutor K. Maricle.

Stephen J. Whelihan: Client charged with aggravated assault. Trial before Judge Galati. Defendant found not guilty. Prosecutor L. Ruiz.

December 12

Roland J. Steinle: Client charged with sexual conduct with a minor and three counts of child molestation. Trial before Judge Sheldon ended December 18. Defendant found guilty. Prosecutor D. Macias.

December 16

Andrew J. DeFusco: Client charged with aggravated assault. Trial before Judge Grounds ended December 19. Defendant found guilty. Prosecutor K. Mills.

Elizabeth S. Langford: Client charged with aggravated DUI. Trial before Judge Portley ended December 20. Defendant found guilty. Prosecutor D. Wolf.

Joseph A. Stazzone: Client charged with escape. Trial before Judge D'Angelo ended December 17. Defendant found guilty (with 1 prior). Prosecutor J. Garcia.

Jeffrey A. Williams: Client charged with possession of marijuana. Trial before Judge Martone ended December 18. Defendant found guilty. Prosecutor L. Martin.

December 17

Carol D. Berry: Client charged with possession of marijuana. Trial before Judge Cole ended with a hung jury (5-3 not guilty). Prosecutor C. Richards.

Nicholas S. Hentoff: Client charged with possession of marijuana. Trial before Judge Schwartz ended December 19. Defendant found not guilty. Prosecutor M. Rales.

Daniel R. Raynak: Client charged with burglary. Trial before Judge Schneider ended December 27. Defendant found guilty. Prosecutor D. Rodriguez.

Kevin M. VanNorman: Client charged with sexual assault. Case dismissed with prejudice by Judge Hendrix on December 18. Prosecutor A. Williams.

December 18

Cecil P. Ash: Client charged with aggravated DUI. Trial before Judge Hendrix ended December 20. Defendant found guilty. Prosecutor T. McCauley.

Donna L. Elm: Client charged with burglary, theft and criminal damage. Trial before Judge Pro Tempore Stirling ended in a mistrial. Prosecutor V. Harris.

December 30

William A. Peterson: Client charged with sale of narcotic drugs. Trial before Judge Cole ended January 02. Defendant found guilty. Prosecutor R. Knapp.

Timothy J. Ryan: Client charged with aggravated DUI. Trial before Judge Pro Tempore Ishikawa ended December 30. Defendant found not guilty. Prosecutor S. Wells. ^

TRAINING CALENDAR

February 05

The Arizona State Bar presents "Practicing at the Top: United States & Arizona Supreme Court" from 9:00 a.m. until 1:00 p.m. at the Arizona Biltmore.

February 06

The Maricopa County Bar presents "Confidentiality & Discoverability of Medical Records" from 4:00 p.m. to 6:00 p.m. in the Board of Supervisors' Auditorium.

February 07 & 08

The Arizona State Bar and APAAC presents "The 1991 Criminal Year in a Nutshell". This one and one-half day seminar will be held at the Holiday Inn at Peoria Avenue and I-17. Up to 25 attorneys from the office may attend. Noted constitutional scholar, Charles Whitebread is one of the featured speakers.

February 13 & 14

The Texas Criminal Defense Lawyers Association & NACDL presents "The Third Annual Trial of a Drug Case" in Houston.

(cont. on pg. 11)

February 14

The Maricopa County Public Defender's Office presents "The Dynamics of Domestic Violence and D.O.V.E. Services". This presentation will be from 11:30 a.m. to 12:30 p.m. in the Public Defender's Training Facility. Bonnie Black, Executive Director of D.O.V.E. will be the featured speaker. This seminar is open to all staff, attorneys and client service workers that can attend.

February 20

The Maricopa County Public Defender's Office presents "Conflicts & Motions to Withdraw". This in-house seminar will be held in the Public Defender's Training Facility and may be eligible for up to two (2) hours of CLE. Faculty includes Attorneys Robert W. Doyle and James Cleary. This seminar will be held from 1:30 p.m. to 3:30 p.m

February 28-March 01

The National Criminal Defense College presents "Advanced Cross-Examination 1992" in Atlanta, Georgia. Ten attorneys from the office are attending.

March 06

The Maricopa County Public Defender's Office presents "Juvenile Justice Issues: Evaluating the Child & Transfer Hearings" at the Board of Supervisors' Auditorium. This seminar is for all juvenile attorneys and trial attorneys. Subjects covered will be child sexual behavior, African-American mental health issues and transfer hearings. Dr. Toni Cavanagh Johnson and Dr. Michael Bayless are the faculty for the seminar. Other speakers to be announced.

April 09-11

The National Legal Aid & Defender Association presents "Appellate Defender Training" in Nashville. Seven appellate attorneys will be attending.

April 10

The Maricopa County Public Defender's Office presents "Cross-Examination" from 10:00 a.m. to 4:00 p.m. in the Board of Supervisors' Auditorium. Terry McCarthy, nationally known trial attorney and lecturer, will be the featured faculty.

May

The Maricopa County Public Defender's Office will present "DUI 1992: Demonstration & Information". Location and faculty to be announced.

June

The Maricopa County Public Defender's Office will present "Ethics & the Criminal Lawyer".

Training Notes:

Bonnie Black, Executive Director of D.O.V.E. (Diversion of Violent Emotions) has agreed to give an hour presentation on domestic violence and how her program works. Bonnie, who has a masters degree in public administration and a bachelor's degree in criminal justice, previously worked for DOC and the Maricopa County Adult Probation Office before joining D.O.V.E. in 1986. This program was originally scheduled for the training attorneys; however, all trial lawyers, client service workers or other office staff are invited to attend. The training will be held in the Public Defender's Training Facility on February 14th from 11:30 a.m. until 12:30 p.m.

Bob Doyle and Jim Cleary will present an in-house presentation on "Conflicts & Motions to Withdraw" on Thursday, February 20th from 1:30 p.m. until 3:30 p.m. in the Public Defender's Training Facility. Bob Doyle is a member of the Arizona State Bar Disciplinary Committee and is very knowledgeable of the ethical rules. Jim Cleary has spoken at the State Bar Convention on ethical issues and authored a portion of the conflicts of interest section in the State Bar's proposed course on professionalism. They will cover such subjects as what constitutes a conflict and how to maintain confidentiality of a former client, as well as how to insure your client receives proper notice of your motion. The training may quality for up to two (2) hours of CLE ethics credit.

Please note that "The 1991 Criminal Law in a Nutshell" is on Friday and Saturday contrary to the January 20th memorandum listing the days as Saturday and Sunday.

Mark your calendar now for our April 10th Cross-Examination seminar. We will have Terry McCarthy as the featured speaker. Terry's cross-examination technique is one of the most effective you will ever hear. Terry will do demonstrations and be looking for volunteers to participate.

We are planning another DUI seminar. One idea is to do a demonstration of a cross-examination of a criminalist. If you think that is a good idea or have other suggestions for speakers or topics, please contact me or Gary Kula. ^

PERSONNEL PROFILES

Gene Cope started work in our Records Section on January 13th. In addition to his employment with our office, Gene is going to school at night, studying business and law.

Rebecca Miller began employment as the office aide for Group A on January 13th. Rebecca is attending evening classes for the Medical Assistant's Program at Apollo College.

AND ADIEU TO. . . .

Priscilla Forsyth who is moving to Iowa where she will serve as an Assistant County Attorney,

and

Susan White who is moving to North Carolina. ^

BULLETIN BOARD

HONOR TO BRENDA BIRKHIMER

Brenda Birkhimer, Administrative Coordinator, was given the United States Department of the Treasury "Patriotic Service Award" for her volunteer work as our department's representative in the 1991 Savings Bond Campaign.

In an accompanying letter of appreciation from the County Manager, Roy Pederson stated, "Your keen sense of responsibility in the performance of your duties reflects great credit on you. I congratulate you...." Brenda was presented with an embossed certificate signed by the Secretary of the Treasury.

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USE OF TRAINING FACILITY

Anyone wishing to use the Public Defender's Training Facility (Luhrs Arcade, Suite 10) for training events or meetings must contact Teresa Campbell at (602) 506-7569 to reserve the room.

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SUBSCRIPTIONS

FOR THE DEFENSE, Copyright, a Maricopa County Public Defender's Office monthly Training Newsletter. A limited number of subscriptions are available at $15.00 per year, for a subscription period of October 01 through September 30. For information, please telephone the staff at (602) 506-8200.